

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7421

**United States Court of Appeals
For the Second Circuit**

ANTON PICINICH,
Plaintiff-Appellant,

-against-

CHRISTIAN HAALAND & BOISE-GRIFFIN
STEAMSHIP COMPANY, INC.,
Defendants-Appellees.

SKIBS A/S SAMUEL BAKKE,
*Defendant and
Third Party Plaintiff-Appellees,*

-against-

JOHN W. McGRATH CORPORATION,
Third-Party Defendant-Appellee.

On Appeal From The United States District
Court for the Southern District of New York

BRIEF SUBMITTED ON BEHALF OF DEFENDANT
AND THIRD-PARTY PLAINTIFF-APPELLEE,
SKIBS A/S SAMUEL BAKKE

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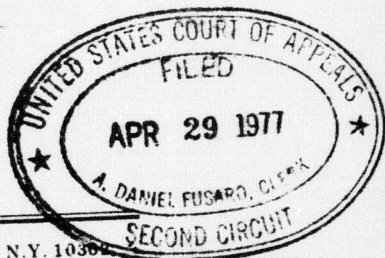


TABLE OF CONTENTS

	<i>Page</i>
Issues Presented for Review	2
The Facts	2
POINT I — The Jury's Verdict in Favor of Defendant Was Supported by Substantial Evidence and Must Stand Unless Clearly Erroneous	5
POINT II — The Trial Court's Charge on Un- seaworthiness Was Correct. Even Assuming Error in the Court's Instructions, it Was Harmless Error	10
POINT III — A Shipowner is not Liable in Negligence or Unseaworthiness Because of the Operational Negligence of a Longshoreman	16
POINT IV — The Trial Court's Charge on the Legal Effect of the Winch Operator's Negligence, if any, was Correct	19
POINT V — A Shipowner Has no Duty to Supervise the Operations of a Contract Stevedore	20
Conclusion	22

CASES CITED

<i>Adams v. Ugland Management Co.</i> , 515 F.2d 89, 90-91 (9th Cir. 1975)	18
<i>Ahern v. Webb</i> , 268 F. 2d 45 (10th Cir., 1959)	10

<i>Albanese v. N. V. Nederl. Amerik Stoomv. Maats.</i> , 346 F.2d 481 (2d Cir., 1965)	21
<i>Albanese v. N. W. Nederl. Amerik Stoomv. Maats.</i> , 392 F. 2d 763 (2d Cir., 1968)	21
<i>Bankers Life & Casualty Co. v. Kirtley</i> , 307 F.2d 418 (8th Cir., 1962)	8
<i>Bernardini v. Rederi A/B Saturnus v. I.T.O.</i> , 512 F. 2d 660, 667 (2d Cir., 1975)	14
<i>Berner v. British Commonwealth Pacific Air Lines, Ltd.</i> , 346 F.2d 532, 536 2 Cir., (1965)	9
<i>Berti v. Compagnie de Navigacion Cyprien Fabre</i> , 213 F.2d 397 (2d Cir., 1954)	21
<i>Boleski v. American Export Lines, Inc.</i> , 385 F.2d 69 (4th Cir., 1967)	6
<i>Boudon v. Lykes Bros. S.S. Co.</i> , 348 U.S. 336, 99 L. ed. 354, 75 S. Ct. 382	12
<i>Caparro v. Koninklijke Nederlandsche Stoomboot Maatschappij</i> , 503 F.2d 1053, 1054 (2d Cir., 1974) ..	18
<i>Cosentino v. Royal Netherlands S.S. Co.</i> , 389 F.2d 726 (2d Cir., 1968) cert. den. 393 U.S. 977	8
<i>Duke v. Blackwell</i> , 429 F.2d 531 (5th Cir., 1970)	8
<i>Ehlers v. Dannen Grain & Milling Company</i> , 275 F. 2d 352 (7th Cir., 1960)	9
<i>Fergusen v. Moore-McCormack Lines</i> , 352 U.S. 521 (1957)	8

<i>Grillea v. United States</i> , 232 F. 2d 919 (2d Cir., 1956) .	17
<i>Grillo v. U.S.</i> , 177 F.2d 904 (2d Cir., 1949)	6
<i>Jacob v. New York</i> , 315 U.S. 752 (1942)	8
<i>Knox v. United States Line Company</i> , 294 F.2d 354 (3rd Cir., 1961)	21
<i>Kraft v. Smith & Johnson S.S. Co.</i> , 235 F.2d 760 (2d Cir., 1956)	6
<i>Kube v. Bethlehem Steel Corp.</i> , 390 F.2d 506 (3rd Cir., 1968)	10
<i>Kyzar Vale Do Ri Doce Navagacai, S.A.</i> , 464 F.2d 285 (5th Cir., 1972)	16
<i>Lester v. United States</i> , 234 F. 2d 625 (2d Cir., 1956) ..	12
<i>Mahnich v. Southern S.S. Co.</i> , 321 U.S. 96 (1944)	6
<i>Malm v. U.S. Lines</i> , 269 F. Supp. 731, aff'd 378 F.2d 941 (2d Cir., 1967)	8
<i>Mascuilli v. U.S.</i> , 313 F. 2d 764 (3rd Cir., 1963)	6
<i>McNeill v. Lehigh Valley R.R. Co.</i> , 387 F.2d 629 (2d Cir., 1967) cert. den. 390 U.S. 1040	6
<i>Miller v. Pacific Mutual Life Insurance Co.</i> , 228 F.2d 889 (6th Cir., 1955)	10
<i>Mitchell v. Trawler Racer, Inc.</i> , 1960, 362 U.S. 539, 550 80 S. Ct. 926, 933, 4 L. Ed. 2d 941, 948	12
<i>Mosley v. Cia. Mar. Adra</i> , 314 F.2d 223 (2d Cir., 1963)	6

<i>Munoz v. Flota Merchante Grancolombiana, S.A.</i> (2d Cir. April 25, 1977 76-7519)	21
<i>Napolitano v. Compania Svd. Americana de Vutores.</i> 421 F.2d 382 (2d Cir., 1970)	8
<i>Nehring v. Empresa Lineas Argentinas Maritimas,</i> 401 F.2d 767 (5th Cir., 1968)	8
<i>Ojmani v. Nederlandsche—Amerikaansche Stoomv. Maat.,</i> 410 F.2d 78 (2d Cir., 1969)	8
<i>Palmer v. Hoffman,</i> 318 U.S. 109 (1943)	10
<i>Price v. S.S. Vara Cruz,</i> 378 F.2d 156, 160 (5th Cir., 1967)	21
<i>Quon v. Niagara Fire Ins. Co. of New York,</i> 190 F. 2d 257 (9 Cir., 1951)	9
<i>Ryan v. Pacific Coast Shipping Co., Liberia,</i> 509 F.2d 1054, 1057 (9th Cir., 1975)	19
<i>Scott v. Spanjer Bros., Inc.,</i> 298 F.2d 928, 932 (2 Cir., 1962)	9
<i>Siderewicz v. Enso-Gutzeit O/Y,</i> 453 F.2d 1097 (2d Cir., 1972)	18
<i>Späno v. Koninklijke Rotterdam sche Lloyd,</i> 472 F.2d 33 (2d Cir., 1973)	11
<i>Spinelli v. Isthmian S.S. Co.,</i> 1963 AMC 1814 aff'd 326 F.2d 870 (2d Cir., 1964)	6
<i>Tanzi v. Deutsche Dampfschiffahrts,</i> 355 F. Supp. 432 (SDNY, 1973)	6

<i>Texas & Pacific Railway Co. v. Behymer</i> , 189 U.S. 468 (1903)	6
<i>Tiller v. Atlantic Coast Line</i> , 318 U.S. 54 (1943)	8
<i>Tugwell v. A.F. Klaveness & Co.</i> , 320 F.2d 866 (5th Cir. 1963) Cert. den. 376 U.S. 951 (1963)	11
<i>Usner v. The Luckenbach Overseas Corp.</i> , 400 U.S. 494 (1971)	16
<i>Werner Transportation Co. v. Dealer's Transportation Co.</i> , 102 F. Supp. 670, aff'd, 203 F.2d 549 (8th Cir., 1953)	10
<i>Zuckerman v. Berg Manufacturing</i> , 279 F.2d 904 (7th Cir., 1960)	8

STATUTE CITED

28 U.S.C. §2111	10
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**IN THE
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Docket No. 76-7421

ANTON PICINICH,

Plaintiff-Appellant,

-against-

**CHRISTIAN HAALAND & BOISE-GRIFFIN
STEAMSHIP COMPANY, INC.,**

Defendants-Appellees.

SKIBS A/S SAMUEL BAKKE,

Defendant and
Third Party Plaintiff-Appellees,

-against-

JOHN W. McGRATH CORPORATION,

Third-Party Defendant-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW
YORK**

**BRIEF SUBMITTED ON BEHALF OF
DEFENDANT AND THIRD-PARTY
PLAINTIFF-APPELLEE,
SKIBS A/S SAMUEL BAKKE**

ISSUES PRESENTED FOR REVIEW

1. Did the Court's Charge properly instruct the jury on the law of unseaworthiness?
2. Did the Trial Court commit error by refusing to charge the jury on theories which had no legal or evidentiary basis?
3. On this record, could there be any unseaworthiness not created by the shipowner's negligence and, conversely, could there be any negligence on the part of the shipowner which did not result in an unseaworthy condition?

THE FACTS

The m/s CONCORDIA VIKING arrived at Pier B, Hoboken, New Jersey, on Sunday, July 11, 1971. On that day, the vessel's crew removed lashings from the deck cargo (540) (543). The Chief Mate testified that he did not know if any lashings were still attached to the containers on that date (546). Two photographs in evidence (D and E) show one of the containers.

The containers involved in this litigation had been loaded on May 28, 1971, at Damman, Saudi Arabia (502). Dunnage had been inserted between the first and second tiers of the containers (503). The dunnage consisted of eight-foot strips running crosswise at the end of each container (601).

The containers involved consisted of eight containers, twenty feet long, eight feet wide and eight feet high, which were stacked on the portside of the deck of the vessel, adjacent to the No. 5 hatch. Since the vessel was moored with its starboard side to the pier, the containers were on the offshore side of the hatch.

The containers were stowed with their long dimension running fore and aft in two tiers. Each tier consisted of four

containers, with two containers side by side, and two containers side by side in front of them. (Defendant's Exhibits O & P illustrate the arrangement.)

On July 12, 1971, pursuant to a stevedoring contract, longshoremen employed by John W. McGrath Corp., the third-party defendant, boarded the vessel to discharge cargo. While the Chief Mate, Captain Vangness, was having breakfast at approximately 8:55 A.M., he was told that an accident had occurred at the No. 5 hatch (552). He went out on deck (553) and looked over the place where the accident had happened (555) on the afterside of the No. 5 hatch. At the time of his inspection, he was standing on the top of the hatch covers (556). The after inshore container was missing (556). However, the remaining containers were in the same position they had been throughout the voyage and there was no damage to any of the containers (557).

Shortly after 8:00 A.M., the longshoremen rigged the vessel to discharge cargo. At the No. 5 hatch, the port forward boom was utilized as the up and down boom, and a house fall was rigged through a block on the pier structure for use in burtoning the drafts, i.e., the vessel's starboard booms were not used during this operation. The deck on which the eight containers were resting had a camber of approximately 16 inches; that is the deck sloped downward from the vessel's midline to the bulwark in a gentle arc, the difference in height being 16 inches. The camber can be seen in defendant's Exhibits D and E in evidence.

Captain Wheeler testified that the camber amounted to 16 inches, based on calculations made from dimensions on the ship's general arrangement plan (702-703). Captain Ash agreed that the vessel's general arrangement plan indicated a camber which was "obvious and apparent" (268).

It is conceded that the containers involved were not secured by lashings at the time of the accident. They were held in position by their own weight (two tons) and the

dunnage stripping between the two tiers of containers. Although plaintiff had alleged that the stowage was insecure because of lack of deck fittings on the deck, there is no evidence on the record that any of the lower containers moved. Accordingly, that point is moot on this appeal.

Plaintiff, Picinich, testified that he had been ordered by his hatch boss to assist in discharging the containers. He went up a ladder placed against the inboard, after, top container (36). After he attached hooks to the container so that it could be lifted (37), the hatch boss ordered him to remove lashings from the adjacent offshore containers (41).

Picinich moved on to the after outboard container in the upper tier, and his partner, Morich, went on to the forward, outboard container. As the after inboard container was being lifted, Picinich heard scraping against the container he was standing on. When the container being lifted cleared, the container he was standing on slid into the empty space (93). At this time, Picinich fell overboard.

Picinich's partner, Morich, testified that the container on which Picinich had been standing slid inboard approximately 5 to 6 feet towards the center of the vessel (149). Plaintiff's and his partner's version was contradicted by the testimony of Langen, a hatch boss at the No. 4 hatch, who testified that the container had ended up "akimbo" (437-38) after being hit by a container being lifted (435). As pointed out above, the vessel's Chief Mate, Mr. Vangness, contradicted the version given by plaintiff and his witnesses. At the time of his inspection after the accident, none of the remaining containers had moved (557).

Plaintiff's trial counsel elicited testimony from his maritime expert, Captain Ash (226, 243) that the containers should have had stacking devices between the first and second tiers. Langen, the hatch boss at the No. 4 hatch, also testified that in his opinion, stacking devices were necessary to insure stability of the containers (453).

In addition to the testimony of the Chief Mate that the containers had not moved at all, Captain Wheeler testified that the stowage of the containers with dunnage between provided a suitable and safe platform (745), that such a procedure was a good and proper way to transport these containers (717).

While grateful to plaintiff's appellate counsel for attempting to set forth the shipowner's defense on Pages 15 to 18 of his brief, his presentation lacks accuracy.

The major thrust of the defense was that the container on which Picinich was standing had not moved at all, much less moved five to six feet as claimed by Picinich and Morich. Neither was it "akimbo" as testified to by Langen. The shipowner further relied on the fact that the ship's camber caused all the containers to tilt outboard, which would require a suspension of the laws of nature to have a "container move uphill."

Basically, the outcome of the trial depended on the jury's assessments of the facts and the credibility of the witnesses presented. The jury's verdict indicates how they assessed the credibility of the witnesses, both fact and expert.

POINT I

THE JURY'S VERDICT IN FAVOR OF DEFENDANT WAS SUPPORTED BY SUB- STANTIAL EVIDENCE AND MUST STAND UNLESS CLEARLY ERRONEOUS.

Plaintiff/appellant's theories of recovery were twofold: (1) the top of the No. 2 container was not reasonably fit for its intended use (unseaworthiness) and, (2) the shipowner created the condition (negligence). In other words, on the facts of this record, the work area was unseaworthy and had been rendered so by shipowner's active negligence.

The *sine qua non* of both theories is the inboard uphill

movement of container No. 2. This movement had to be proven to establish the foundation for plaintiff's claims.

Whether or not the condition complained of made the vessel unseaworthy is, of course, a question of fact to be determined by the jury. *Boleski v. American Export Lines, Inc.*, 385 F.2d 69 (4th Cir., 1967); *Masculilli v. U.S.*, 313 F.2d 764 (3rd Cir., 1963). The question of the unseaworthy condition or shipowner's negligence being the proximate cause of the injury is also a question of fact. *Kraft v. Smith & Johnson S.S. Co.*, 235 F.2d 760 (2d Cir., 1956).

Plaintiff had the burden of proving the alleged unseaworthy condition and shipowner's negligence, *Spinelli v. Isthmian S.S. Co.*, 1963 AMC 1814 aff'd 326 F.2d 870 (2d Cir., 1964); *Grillo v. U.S.*, 177 F.2d 904 (2d Cir., 1949); *Tanzi v. Deutsche Dampfschiffahrts*, 355 F. Supp. 432 (SDNY, 1973) and the burden of showing by a fair preponderance of the credible evidence that his accident was caused by the unseaworthy condition or shipowner's negligence. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Texas & Pacific Railway Co. v. Behymer*, 189 U.S. 468 (1903); *McNeill v. Lehigh Valley R.R. Co.*, 387 F.2d 629 (2d Cir., 1967) cert. den. 390 U.S. 1040; *Mosley v. Cia. Mar. Adra*, 314 F.2d 223 (2d Cir., 1963).

As noted, the principal dispute at trial centered around the movement of the No. 2 container or lack thereof. Appellee submits that the jury's verdict was obviously based on their rejection of plaintiff's evidence as improbable, unreasonable and contrary to the laws of physics and common sense. A two ton container does not move uphill in the direction from which it has just been struck by another container.

Picinich testified that the container slid inboard for five feet (114); Morich testified that the container slid inboard four to six feet (129, 148, 149); Langan testified that after the accident, container No. 2 was "akimbo" and had slid inboard (436-438). This testimony was directly con-

tradicted by Captain Vangnes, the ship's Chief Officer, who testified that when he inspected the scene of the accident, the container was still in its original position. Captain Wheeler testified (475-477) that such movement without damage to the roof of the bottom of the container was physically impossible.

Picinich and Morich both agreed that the accident happened shortly after 8:00 A.M. (33-34, 129). Since Langan's gang didn't begin working in the No. 4 hatch until after 10:00 A.M. (489), his version is suspect because of the chronology above.

The improbability of Langen's "eyewitness" testimony was further explored on cross examination. Aside from the time difference, Langen testified that he was about to descend a forward ladder in the No. 4 hatch with his back to the ladder (482) and was able to view the accident which was almost two hatches away through a superstructure, winch platform and a winch operator (491); through seven containers that were stacked 16 feet high and 16 feet across, adjacent to No. 5 hatch (489-490).

Picinich testified that the weather was calm, the ship stable and steady and that there was no passing traffic (119-120). Defendant's Exhibit D, a photograph of the vessel's weather deck, clearly depicted a pronounced camber which Captain Wheeler testified was a 16 inch difference in the height between the center line of the vessel and the side of the vessel. Captain Wheeler also testified that, in his opinion, it would take at least a 20° list of the vessel to move the container in question inboard (744-746) and that he could conceive of no force that would move container No. 2 four to six feet inboard as claimed.

The keystone of Captain Ash's testimony was the inboard movement of container No. 2, accordingly, a rejection by the jury of plaintiff's version that the container moved inboard four to five feet would render Ash's testimony valueless.

Of course, appellee is unable to state the basis of the jury verdict,—but it is conceivable that the jury may have accepted plaintiff's testimony that he was standing in the middle of the container pulling hand over hand on a corner lashing. (91, 92, 100) Langan's testimony that he observed plaintiff staggering backwards (493) and rejected the contention that the mere fact that a lashing was present rendered the vessel unreasonably fit for its intended use or the work area unsafe.

Whatever the grounds for their verdict, it is well established, as Judge Weinfeld stated in *Malm v. U.S. Lines*, 269 F. Supp. 731, aff'd 378 F.2d 941 (2d Cir., 1967), "the law at times recognizes the jury's right to an idiosyncratic position" and a jury finding supported by proof will not be disturbed. *Napolitano v. Compania Svd. Americana de Vatores*, 421 F.2d 382 (2d Cir., 1970); *Nehring v. Empresa Lineas Argentinas Maritimas*, 401 F.2d 767 (5th Cir., 1968).

It is equally well established that on disputed questions of fact, the verdict of a jury is controlling unless clearly erroneous. *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521 (1957); *Duke v. Blackwell*, 429 F.2d 531 (5th Cir., 1970); *Ofmani v. Nederlandsche—Amerikaansche Stoomv. Maat.*, 410 F.2d 78 (2d Cir., 1969). Although the questions may be close ones, that does not justify the reviewing Court in usurping the function of the jury. *Jacob v. New York*, 315 U.S. 752 (1942); *Tiller v. Atlantic Coast Line*, 318 U.S. 54 (1943); *Cosentino v. Royal Netherlands S.S. Co.*, 389 F.2d 726 (2d Cir., 1968), cert. den. 393 U.S. 977.

It is respectfully submitted that the evidence must be viewed in the light most favorable to appellee, giving appellee the benefit of all inferences that may reasonably be drawn therefrom. *Bankers Life & Casualty Co. v. Kirtley*, 307 F.2d 418 (8th Cir., 1962); *Zuckerman v. Berg Manufacturing*, 279 F.2d 904 (7th Cir., 1960). This Court's

review should be limited to a consideration of whether there was any evidence which, together with all the reasonable inferences that might be drawn therefrom, supports the jury's verdict. *Ehlers v. Dannen Grain & Milling Company*, 275 F. 2d 352 (7th Cir., 1960).

The jury is to be given the broadest leeway in resolving factual issues. As noted by this Court in *Berner v. British Commonwealth Pacific Air Lines, Ltd.*, 346 F.2d 532, 536 2 Cir., (1965),

" 'It is the jury, not the court, which is the fact-finding body. * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'

* * *

'Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.' "

See, also, *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 932 (2 Cir., 1962).

Nor does the fact that plaintiff produced three witnesses to the accident and the defendant produced only one, the Chief Officer, whose testimony was to what he saw at the scene shortly afterwards affect the validity of the jury's verdict. In *Quon v. Niagara Fire Ins. Co. of New York*, 190 F.2d 257 (9 Cir., 1951) the Court said at page 259:

"In any event, it is not true that the trier of the fact is bound to find in accordance with the statement of one witness or any number of witnesses which do not satisfy his mind. This is a stock instruction to juries. The burden of proof was on appellant. If the testimony produced lacked credibility, it was not proof even if uncontradicted. The problem of proof cannot be resolved scientifically by quantitative analysis, as some have suggested. * * *."

It is submitted that the jury's verdict in this case is amply substantiated by the trial record.

POINT II

THE TRIAL COURT'S CHARGE ON UN-SEAWORTHINESS WAS CORRECT. EVEN ASSUMING ERROR IN THE COURT'S INSTRUCTIONS, IT WAS HARMLESS ERROR.

The doctrine of harmless error expressed in Rule 1 of the Federal Rules of Civil Procedure and the Judicial Code, 28 U.S.C. §2111 is applicable to errors in instructions to the jury. *Werner Transportation Co. v. Dealer's Transportation Co.*, 102 F. Supp. 670, aff'd, 203 F.2d 545 (3d Cir., 1953), and whether or not the putative errors in the Court's charge were harmless or prejudicial depends upon whether the substantial rights of appellant were affected thereby. It is the appellant who has the burden of proving that prejudice resulted from the claimed errors. *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Ahern v. Webb*, 268 F.2d 45 (10th Cir., 1959).

The proceedings below must be viewed in their entirety and the Court's instruction must be considered as a whole and not out of context. *Miller v. Pacific Mutual Life Insurance Co.*, 228 F.2d 889 (6th Cir., 1955); *Kube v. Bethlehem Steel Corp.*, 390 F.2d 506 (3rd Cir., 1968).

This Court's review should not be a microscopic examination of the proceedings to ascertain if they lack perfection, but should perform the more substantial function of determining whether, assuming any of Judge Griesa's instructions were erroneous, they were really harmful to appellant. *Tugwell v. A.F. Klaveness & Co.*, 320 F.2d 866 (5th Cir., 1963) Cert. den. 376 U.S. 951 (1963).

Appellees respectfully submit that the charge, in its entirety, was a proper presentation of the law as it applied to the facts before the jury and, even if there were minor error, it did not effect the substantial rights of appellant. *Spano v. Koninklijke Rotterdam sche Lloyd*, 472 F.2d 33 (2d Cir., 1973).

Plaintiff claimed that the following conditions rendered the vessel unseaworthy and were created by the negligence of the shipowner:

1. The presence of one or two lashings hanging loosely from the top outbound after container.
2. The four bottom containers of the group were not secured to the deck by special fittings.
3. The lashings had been removed by the crew on the day before the accident.
4. The top layer of four containers was not adequately secured to the bottom layer of containers by stacking devices.
5. There was not sufficient space between the containers to permit the longshoremen to use ladders to attach the lifting gear to the containers.

The only claim against the shipowner which sounded in negligence only was that the shipowner had failed to supervise the stevedoring operation involved in the lifting off of the first container.

On the other side of the ledger, the only claim of un-

seaworthiness without shipowner's negligence was the allegation that the "method" used by the longshoremen to lift the first container rendered the vessel unseaworthy.

The last two claims mentioned above were not submitted to the jury. Why they were not is discussed in Points III, IV, and V of this brief.

The claim (2) that the four bottom containers were not secured is moot since there is no evidence produced on the record that these containers moved.

The language of the Supreme Court of the United States in *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550, 80 S. Ct. 926, 933, 4 L. Ed. 2d 941, 948, has been the standard used by the Courts to define seaworthiness:

"What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peri. of the sea, but a vessel reasonably suitable for her intended service. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 99 L. ed. 354, 75 S. Ct. 382."

This Court, in *Lester v. United States*, 234 F. 2d 625 (2d Cir., 1956) clearly indicated that the application of the doctrine of unseaworthiness was dependent on the facts of each case.

"The seaworthiness of a ship, her equipment and appurtenances is a relative concept, dependent in each instance upon the circumstances in which its fitness is drawn in question. Thus in this case the crucial consideration is whether, in view of all the circumstances attending libellant's fail and the status of the Q-100 at the time, the Q-100 was, in

all respects pertinent to the injury, reasonably fit to permit libellant to perform his task aboard the ship with reasonable safety." (P. 628).

It should be noted that this Court used the words "reasonably fit" and "with reasonable safety" in close proximity.

To count the number of times Judge Griesa used the word "reasonable" in a charge to a jury on unseaworthiness, in total disregard of the impact of the charge as a whole, is an argument without substance.

In his charge, Judge Griesa instructed the jury that the shipowner's duty to provide a seaworthy vessel was:

1. Continuing and non-delegable (905)
2. Absolute and not affected by the stevedore's control of the area (906)
3. Independent of any duty owed by the stevedore (906)
4. Independent of negligence, fault or blame (906-907)
5. Independent of any notice to shipowner or its employees (906)

Judge Griesa also told the jury:

"So the theory of unseaworthiness is the theory of an unsafe condition not personal fault on anyone's part."

"The most helpful way to say this is that unseaworthiness is really a physical condition and how that condition came into being and whose fault it might have been is really irrelevant as long as the jury finds that there is a physical condition which comes within the rules of unseaworthiness." (907)

The jury was told that if there was an unseaworthy condition, which was a proximate cause of the accident, it was sufficient to make the defendant liable (920).

While plaintiff has not excepted to the negligence charge, except for his objection to the Court refusing to charge that the shipowner had a duty to supervise the stevedore, he has intimated that the Court should have charged that compliance with the reasonable custom and practice would not exonerate the shipowner. (Plaintiff's brief P. 44).

Not having requested such a charge below, the plaintiff cannot now assign the failure to give such a charge as error. Rule 51, Federal Rules of Civil Procedure.

Despite the tortuous reasoning and endless citations of distinguishable cases contained in appellant's brief, it should be obvious that the jury was well aware that they first had to find that the container on which appellant was standing moved, before they had to determine whether the condition of the eight containers, or more precisely, the stability of the container on which appellant was standing at the time of the accident was not reasonably fit for the appellant to stand on in the course of his duties.

If they found it was not reasonably fit, the vessel was unseaworthy and the shipowner was also negligent because the officers and crew had created the condition. If it was reasonably fit, then the vessel was seaworthy and the shipowner was not negligent. The negligence of the shipowner was urged by plaintiff's trial counsel throughout the trial, apparently to bolster his weak claim of unseaworthiness. The evidence he relied on to prove both negligence and unseaworthiness was identical.

On this record, the words of Judge Gurfein in *Bernardini v. Rederi A/B Saturnus*, 512 F. 2d 660, 667 (2d Cir., 1975) are particularly appropriate.

"... This is the exceptional case where a breach of duty can be constructed only if the deck was in an unseaworthy condition."

"... In this case, we can find no single act of negligence which did not of itself create a condition

longlasting enough to constitute unseaworthiness."

In an earlier case, *Spano v. Koninklijke*, 472 F.2d 33, 35, (2d Cir. 1973) the Court, as if anticipating this appeal, observed:

"Any difficulty on this point and others directed to the charge could have been avoided if counsel had not insisted on alleging both negligence and unseaworthiness. It is hard to imagine, especially on the facts of this case, how an owner could be negligent, if the ship was not unseaworthy, see G. Gilmore & C. Black, *The Law of Admiralty* 364 (1957). . . ."

On the trial, as indeed on this appeal, the *Leitmotiv* was the fact that plaintiff sustained a "maritime industrial accident" on board the CONCORDIA VIKING, which automatically entitled him to a recovery without regard to rules of law governing the liability of a ship owner or sufficiency of proof. Implicit in this novel doctrine is a suspension of the jury's function of weighing the credibility of witnesses and the physical laws governing the universe.

The jury had the responsibility of assessing the credibility of the fact and expert witnesses as well as the exhibits in evidence in the course of an eight-day trial. Understandably displeased with the jury's verdict, plaintiff's counsel resorts to an argument that the jury was misled by the Trial Court's charge to the jury on unseaworthiness.

As Judge Brown observed in *Tugwell v. A.F. Klaveness and Company*, 320 F.2d 866, 870 (5th Cir., 1963):

"After a long and hard, well fought trial, the jury, with ample intrinsic and extrinsic evidence and the opportunity to observe the witnesses close at hand, concluded that the accident never took place. That was the function of the jury, and neither of these two isolated episodes infected the results. That is the end of it.

'Affirmed.' "

POINT III

**A SHIPOWNER IS NOT LIABLE IN
NEGLIGENCE OR UNSEAWORTHINESS
BECAUSE OF THE OPERATIONAL
NEGLIGENCE OF A LONGSHOREMAN.**

As plaintiff correctly surmised on Page 57 of his Brief, the defendant will rely upon *Usner v. The Luckenbach Overseas Corp.*, 400 U.S. 494 (1971) in support of the proposition cited immediately above:

"... To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions. In *Trawler Racer*, *supra*, there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the shipowner liable. The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence. The judgment of the Court of Appeals is affirmed." (P. 500)

In *Kyzar Vale Do Ri Doce Navagacai, S.A.*, 464 F.2d 285 (5th Cir., 1972), the Court, in footnote 7, Page 292, described a charge of the Honorable Edward Weinfeld on operational negligence as a lucid and comprehensible exposition of operational negligence. In all humility, we agree with the learned Court and quote the pertinent extract from the charge at 293, *supra*:

"... And during the course of such operations the previously fit ship or appliance is rendered

unsafe because of the negligent act of some person.

In such an instance, if the negligent act itself is in process and has not yet ripened into an unseaworthy condition, the act, during its commission, is referred to as operational negligence — and in that limited circumstance the shipowner would not be liable.

In other words, if the defect arose as a momentary step or a phase in the progress of work aboard an otherwise seaworthy ship, and was an incident in the continuous course of operation — and an unseaworthy condition had not yet resulted, the shipowner is not liable.

On the other hand, if the momentary phase has ended and the act had ripened into a condition of unseaworthiness at the time the accident occurred, then the shipowner is responsible.

Thus, there is a point at which negligent conduct ends and an unseaworthy condition begins.

If the act results in the condition of unseaworthiness at the time of the accident, then the owner is liable; if the act falls short of creating the condition at the time of the accident, it is not."

Although Judge Weinfeld's charge on operational negligence anticipates the decision in *Usner*, his analysis of *condition* as a basis for unseaworthiness is in full accord with the Supreme Court's reasoning:

"The reason of course is that unseaworthiness is a condition, and how that *condition* came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it." (498) (Emphasis — The Court's)

In *Grilleu v. United States*, 232 F. 2d 919 (2d. Cir., 1956), before the *Usner* decision, the late Judge Learned Hand made essentially the same point. If there is an un-

seaworthy condition which caused injury to a longshoreman, the shipowner is liable whether it created the condition or the longshoremen created the condition.

The cases cited in plaintiff's Brief to illustrate the "Grillea Doctrine" (Pages 57-60) all involve an *unseaworthy condition* caused by negligence of the stevedore's employees. A brief consideration of two of the cases should suffice to illustrate the point.

In *Siderewicz v. Enso-Gutzeit O/Y*, 453 F.2d 1097 (2d Cir., 1972), the Court held that "if putting nine bales in a draft rendered the vessel unseaworthy", the shipowner was liable in unseaworthiness even though it might have been negligent practice on the part of the stevedores. Obviously, there was a *condition* present in that case just as in *Kyzar v. Vale Do Ri Doce Navagacai S.A.*, 464 F. 2d 285 (5th Cir., 1972), where the allegedly unseaworthy *conditions* were the lack of tag lines and the improper spotting of the boom over the hatch, among others.

On Page 52 and 53 of his Brief, plaintiff sets forth the evidentiary basis for his claim that the method of unloading was improper and rendered the vessel unseaworthy. In this connection, it should be pointed out that the only general agreement that some contact had occurred between the inshore and offshore container during the lifting process is between plaintiff and his witnesses.

The decision to lift this *first* container was made by the stevedore's hatch boss. If the decision was improvident under the circumstances, the negligence, if any, was that of the hatch boss. Since the lifting of the container, a single, isolated act, did not cause an unseaworthy condition, the shipowner is not liable for the hatch boss' negligence. *Caparro v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 503 F.2d 1053, 1054 (2d Cir., 1974); *Adams v. Ugland Management Co.*, 515 F.2d 89, 90-91 (9th Cir., 1975).

As the Ninth Circuit observed in *Ryan v. Pacific Coast Shipping Co., Liberia*, 509 F.2d 1054, 1057 (9th Cir., 1975), plaintiff's attempt to convert a single negligent act on the part of a longshoreman is a play on words:

"... Virtually any such act could be described as an adoption by the person committing the act of an unsafe practice . . ."

Judge Griesa's refusal to rely on a play on words to convert a putative single act of negligence into unseaworthiness should be affirmed by this Court.

POINT IV

THE TRIAL COURT'S CHARGE ON THE LEGAL EFFECT OF THE WINCH OPERATOR'S NEGLIGENCE, IF ANY, WAS CORRECT.

In the course of his summation, the appellant's trial counsel read the following language from the Superintendent's Report of Accident (Plaintiff's Exhibit 9 in evidence) to the jury:

"Under supervision of hatch boss, the winch driver took up strain on inboard container, causing it to swing and bump into outboard container."

Counsel went on to describe this action as the force which allegedly caused the container on which plaintiff was standing to move. Since under the plaintiff's theory, the swinging of the container being lifted was a link in the chain of events which caused the accident, the shipowner was entitled to an instruction to the jury on the legal significance of the winch driver's action. The Judge's charge to the effect that the shipowner is not liable in negligence for any fault or neglect on the part of the winch operator employed by the stevedoring company in the momentary handling of the winch was based on evidence in

the record. *Usner v. Luckenbach Overseas Corp.*, 1971, 400 U.S. 494, 500; 91 S.Ct. 514, 518; 271 Ed. 2d. 562, 567 and the other cases cited in Point III of this brief.

His trial counsel, having introduced the Superintendent's Report into evidence and having chosen to read from it in the course of summation, plaintiff cannot be heard to claim that there was no evidentiary basis on the record which justified the Judge's charge.

As to the argument contained in Part IV of the Appellant's Brief (p. 63), that the Court should have given a further charge to the jury cautioning them that such negligence of the stevedore did not exonerate the defendant where such negligence merely activated an underlying unsecure condition. It can be answered by noting that Judge Griesa did charge the jury on plaintiff's theories of negligence and unseaworthiness governing his claim that the containers were stowed in an unstable fashion.

On page 909, Judge Griesa specifically cautioned the jury that if there were several causes of the event, shipowner was liable if unseaworthiness was one cause. Indeed, he later specifically instructed the jury that the instability of the containers would be one cause if the bumping resulted in the injury. (910)

POINT V

A SHIPOWNER HAS NO DUTY TO SUPERVISE THE OPERATIONS OF A CONTRACT STEVEDORE.

The stevedoring work being performed on board the s/s CONCORDIA VIKING on July 12, 1971 was being conducted by John W. McGrath Corporation, pursuant to a contract dated June 4, 1971 (defendant's Exhibit B in evidence). The contract contains the following language:

"III^e Stevedoring Services

1. The contractor agrees to perform the following described services:

(a) provide stevedoring labor, gang sorters, hatch foremen and drivers, and provide gear and mechanical equipment for the stevedoring of vessels of the owner.

The contract also agrees to provide stevedoring supervision as is needed for the safe and efficient conduct of work and safe and careful handling of cargo by longshoremen."

In *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F.2d 397 (2d Cir., 1954), this Court held that a shipowner has no duty to supervise the operation of a contract stevedore. The contract language set forth at Page 399 is similar to the contractual language cited above.

The Court cited *Berti, supra*, when again affirming the proposition that a shipowner has no duty to supervise stevedoring operations being conducted by an independent contractor.

"... For when a shipowner hires a qualified stevedore to load the vessel, the standard of due care does not require that he actively supervise the stevedore's work"

Albanese v. N.V. Nederl. Amerik Stoomv. Maats., 346 F.2d 481 (2d Cir., 1965). Of course if an unsafe condition is created the shipowner could be held liable in unseaworthiness or for its own negligence. *Albanese v. N.V. Nederl. Amerik Stoomv. Maats.*, 392 F. 2d 763 (2d Cir., 1968). See also: *Knox v. United States Line Company*, 294 F.2d 354 (3rd Cir., 1961); *Price v. S.S. Vara Cruz*, 378 F.2d 156, 160 (5th Cir., 1967); *Munoz v. Flota Merchante Grancolombiana, S.A.* (2d Cir. April 25, 1977 76-7519).

The Judge's refusal to charge that the shipowner had a duty to supervise the stevedore was entirely correct.

CONCLUSION

**THE JUDGMENT OF THE DISTRICT COURT
SHOULD BE IN ALL RESPECTS AFFIRMED.**

Respectfully submitted,

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